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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1672

T. W. GUTHRIE, ET AL,
Petitioners.

versus

ALABAMA BY-PRODUCTS COMPANY, ET AL,
Respondents.

APPLICATION FOR REHEARING

on Refusal of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioners request that the Court reconsider its denial of the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioners respectfully submit that the refusal to review the actions of the Northern District of Alabama and the Fifth Circuit has left an anomalous situation for private citizens' actions under the Rivers and Harbors Act of 1899 (Refuse Act), 30 Stat. 1152, as amended, and particularly under Section 13 of that Act, 33 U.S.C. §407.

First: Private citizens' actions can apparently be brought under sections of the Act other than Section 13. See cases cited pages 18-20 of the Petition for Certiorari. Thus, only where refuse or pollution causes the damage is a private

citizen denied relief for a violation of the Act. Petitioners submit that allowing a civil action under some sections of the Act and not Section 13, is inherently discriminatory and a denial of due process to those private citizens.

Second: Private citizens can maintain an action under Section 13 if they are navigating the waterway, but not if they live on the waterway. See: *Acme Boat Rentals v. J. Ray McDermott & Co.* (U.S.C.A. 5th 1970) 424 F. 2d 393. This, too, is inherently discriminatory and a denial of due process.

Third: If the position of the United States, as set forth in point 3 of the Solicitor General's memorandum is correct, Section 13 is to be construed in one way when the United States is a party and in another way when a private citizen is a party. Since no particular incidents of sovereignty can compel this conclusion, the position of the United States, as set forth in its brief, is that the Act should be applied to discriminate against the very class of citizens most directly injured.

Fourth: In interviews conducted with counsel of the Environmental Protection Agency and the Solicitor General's staff on March 9, 1973, it was stated that the E.P.A. had not been unduly concerned with the decision in this case because, while it has been repeatedly cited by defense counsel in actions brought under the Pollution Act, the United States had so far been able to prevail on the Courts considering the actions to disregard this decision and to distinguish the case. But there is no rational basis for such a distinction as that suggested by the United States and to allow the decision to stand is a risk that may ultimately return the Pollution Act to its prior oblivion.

Fifth: It is the avowed policy of E.P.A. and of the Department of Justice to continue to bring actions, where allowed by the 1972 amendments to the Water Pollution

Control Act irrespective of any navigational interest or interference or impediment to navigation.

We recognize that we filed our response to the Solicitor General's memorandum late and, therefore, it is possible that some of the justices were unable to consider it before ruling on our Petition for Writ of Certiorari. We, therefore, respectfully request the Court to review our said response which is adopted as an appendix to this Application for Rehearing. We urge that the Court reconsider the response to the Memorandum of the Solicitor General to the United States and the brief of the Environmental Protection Agency. We urge that this Court grant the Writ of Certiorari and reverse the lower courts and, thus, reaffirm the right of the private citizen, not merely the United States, to protect his own interests in the Courts of this Nation.

Respectfully submitted.

Roscoe B. Hogan
Counsel for Petitioners

March 15, 1973